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March 30, 1992

HAND DELIVERED

Ms. Donna R. Searcy, Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: Tariff Filing Requirements for Interstate Common Carriers, cc Docket No. 92-13, Notice of Proposed Rulemaking (rel. Jan. 28, 1992)

Dear Ms. Searcy:

OCOM Corporation, by its attorneys, hereby files an original and nine (9) copies of its comments in the above-captioned proceeding.

In addition, please date-stamp and return by hand the extra copy that is enclosed. If you have any questions, please contact the undersigned.

Sincerely,

Simone Wu
(Admitted to practice in Illinois only)
Attorney for OCOM Corporation

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Tariff Filing Requirements for Interstate Common Carriers	)	CC Docket No. 92-13

COMMENTS OF OCOM CORPORATION

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SUMMARY

OCOM Corporation ("OCOM") strongly supports the Commission's original analysis in the Competitive Carrier rulemaking that the Communications Act provides the Commission with the authority to forbear from requiring nondominant interexchange carriers to file tariffs under Section 203.

The Competitive Carrier rulemaking was a watershed event in the development of competition in the long distance market. Since its adoption, competition in the market has exploded and consumers have reaped the benefits in terms of availability, variety and prices of competitive services. Given the current dynamic marketplace, it would be unthinkable for the Commission to reimpose antiquated, anticompetitive rate regulation on competitive, nondominant carriers. Section 203(b)(2) specifically provides the Commission with the flexibility to modify Section 203(a)'s tariffing provision "by general order applicable to special circumstances or conditions." That is exactly what the Commission did in the Competitive Carrier rulemaking.

Neither Maislin Industries v. Primary Steel, 110 S. Ct. 2759 (1990), nor any other court decision since the adoption of the forbearance policy undermines

the validity of the Commission's analysis regarding its authority in Competitive Carrier. Maislin addressed the question of whether negotiated rates not reflected in a filed tariff should supersede applicable rates in a previously filed tariff under the Interstate Commerce Act. Thus, not only is Maislin not on point, but, as an Interstate Commerce Act case, Maislin is only useful by analogy due to the different directions the Communications Act and the Interstate Commerce Act and their associated industries have gone in the nearly 60 years since the enactment of the Communications Act.

Congress has explicitly recognized the forbearance policy by enacting the Telephone Operator Services Consumer Improvement Act, 47 U.S.C. § 226. Both House and Senate Reports on this legislation demonstrate that Congress so completely accepts the Commission's forbearance policy that it felt compelled to adopt specific legislation to reverse it with regard to a small class of nondominant carriers -- alternative operator services providers.

In light of the congressional, judicial and industry acceptance of the forbearance policy and the Commission's authority under the Communications Act to implement the policy, the Commission should not now back-

track and stop the widespread public benefits which resulted from the development of healthy competition following the Competitive Carrier decisions.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Tariff Filing Requirements for Interstate Common Carriers	)	CC Docket No. 92-13

COMMENTS OF OCOM CORPORATION

OCOM Corporation ("OCOM"), by its attorneys, hereby submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding.[1]

Introduction

It does not overstate the case to characterize the Competitive Carrier rulemaking as one of the watershed events in the development of competition in the long distance telecommunications services market. Since its

[1] Tariff Filing Requirements for Interstate Common Carriers, CC Docket No. 92-13, Notice of Proposed Rulemaking (rel. January 28, 1992). OCOM is a provider of domestic resale interexchange services.

adoption, competition in the market has exploded and consumers have benefitted.

For example, the total amount of interstate "switched areas minutes" handled by the long-distance industry has climbed steadily at an average rate of 12% per year from the third quarter of 1984 to the fourth quarter of 1991. This translates, over the course of the same period, into an increase from 37.5 billion to 83.4 billion minutes. Perhaps, the more telling statistic is that while the consumer price index has risen, on the average, 4% per year during the period of 1984 to 1991, the price index measuring consumers' costs for interstate telephone toll calls fell at an annual average of nearly 5%. Today there are well over 400 nondominant interexchange carriers while there were only a handfull in 1982.

Given current dynamic and competitive marketplace conditions, it is unthinkable that the Commission would seek to reimpose outmoded, anticompetitive rate regulation. Nevertheless, the Commission now asks whether its forbearance policy is lawful under applicable sections of the Communications Act of 1934, 47 U.S.C. § 151 et seq. ("Communications Act" or "Act"). It is not clear why.

In the course of the Competitive Carrier proceeding, the Commission closely analyzed relevant case law and the legislative history of the Communications Act and its predecessor, the Interstate Commerce Act, 49 U.S.C. §§ 10101 et seq. ("Interstate Commerce Act" or "ICA"), before concluding that it had the authority and the public policy justification under the Act to implement the forbearance policy. In time, the FCC chose, in furtherance of the goals of the Communications Act and in order to administer the Act more efficiently, to incorporate forbearance into its regulatory structure for nondominant carriers.

The FCC's original analysis and continuing application of forbearance is still sound. The public derives great benefit from the competition that has flourished under the competitive carrier system. Neither Maislin Industries v. Primary Steel, 110 S.Ct. 2759 (1990), which is cited in the NPRM, nor other court decisions or legislative action since the adoption of the FCC's forbearance policy undermines the validity of the Commission's view on the scope of its authority.

I. THE COMMISSION'S FORBEARANCE POLICY IS RECOGNIZED BY CONGRESS, THE COURTS AND THE INDUSTRY AT LARGE.

In the 10 years since the initial adoption of the forbearance policy and the over 12 years since the policy first received prominent attention, Congress has not questioned the Commission's authority to undertake this form of regulation. Unlike run-of-the-mill, day-to-day regulatory decisions, Congress would likely have addressed such a fundamental redesign of common carrier regulation if it believed the Commission was acting outside its authority.[2]

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[2] As the Commission knows, Congress is active on communications issues. For example, in 1988 Congress passed an appropriations law that prohibited the Commission from expending funds on an inquiry aimed at eliminating a preferences policy for women and minorities in comparative hearings. The FCC subsequently ended its "inquiry" into its preferences policy. In 1989, Congress amended Section 208 of the Communications Act to require that complaints on common carrier rates and charges must be resolved by the FCC generally within 12 or, if the case is particularly complex, at most within 15 months.

The FCC's decision to eliminate the fairness doctrine in 1989 also received a great deal of Congressional attention. Several bills were introduced in Congress to codify the fairness doctrine into law, although none have passed. Only this week, Congress began action regarding the Commission's recent broadcast ownership proposals. Cable regulation, including cable/telco issues in particular, has also received continuing attention for years.

To the contrary, in subsequent legislation addressing the issue of tariff filings for certain non-dominant carriers, Congress specifically recognized the FCC's authority to forbear from requiring tariffs to be filed by certain other carriers. In 1990, well after the adoption of the Commission's forbearance policy, Congress enacted the Telephone Operator Services Consumer Improvement Act (the "Operator Services Act"), 47 U.S.C. § 226, which overrode the FCC's forbearance policy -- but only in a narrow market niche -- by requiring alternative operator service providers ("OSPs") to file informational tariffs with the Commission.[3] By acknowledging the forbearance policy and electing to change it in only one particular aspect, Congress clearly affirmed the FCC's power to have adopted the deregulatory program enacted in the Competitive Carrier rulemaking.[4]

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[3] OSPs, which are considered nondominant common carriers, had become the focus of significant consumer complaints, particularly with respect to rates and charges.

[4] Even in the Operator Services Act, after having reversed forbearance to the extent necessary to require informational tariff filings, Congress renewed FCC's power to forbear completely if, at a later time, it determines the public interest so requires. 47 U.S.C. § 226(h). Also, Congress apparently recognized the flexibility inherent in Section 203 of the Act in requiring OSPs to file only "informational" tariffs not requiring prior FCC

(Footnote continued)

There are several references in the Senate and House Reports on the OSP legislation to the FCC's forbearance policy; neither report questions the propriety of the policy in any way.[5] See S. Rep. 439, 101 Cong., 2d Sess. at 3 n.10 (1990) (Senate Committee on Commerce, Science and Transportation noting "[t]he FCC has chosen to 'forbear' from regulating the rates of 'non-dominant' carriers . . ." without questioning the FCC's authority to do so); H. Rep. 213, 101 Cong., 1st Sess. at 3 (1989) (House Committee on Energy and Commerce stating without comment "[s]ince the FCC classifies these [OSPs] as 'non-dominant' or carriers without market power, the Commis-

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(Footnote 4 continued from previous page)
approval without seeing a need to modify Section 203.

[5] This congressional recognition of the FCC's forbearance policy is especially significant considering the enactment of the Operator Services Act was preceded by the Supreme Court's decision in Maislin Industries v. Primary Steel, 110 S. Ct. 2759 (1990). Given that Congress is generally deemed to know the state of the law when it enacts -- or fails to enact -- legislation, see, e.g., Cannon v. University of Chicago, 441 U.S. 677, 696-99 (1979), Congress' failure to even tacitly condemn the FCC's forbearance policy in light of Maislin must be seen as concurrence with that policy. See also Office of Communication of United Church of Christ v. FCC, 707 F.2d 1413, 1429 n.48 (D.C. Cir. 1983) (Subsequent congressional statements regarding prior legislative intent are traditionally awarded "great weight").

sion currently does not regulate their rates"); id. at 6 ("the FCC has refused to regulate [OSP] rates because doing so would violate the Commission's long-standing policy of regulating only those companies with market power").

Congress clearly accepted the forbearance policy so completely that it felt compelled to pass legislation to reverse it in this specific application. In doing so, Congress necessarily approved the forbearance policy as applied to other markets.

The courts have also not altered the FCC's regulatory structure. The only aspect of the Competitive Carrier decisions reversed by the court was the Sixth Report and Order which went beyond the forbearance policy and prohibited nondominant carriers from filing tariffs.[6] The D.C. Circuit found this step exceeded the Commission's authority under the Communications Act. MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985). The court did not reach the issue of whether permissive forbearance was lawful.[7]

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[6] Policy and Rules Concerning Rates for Competitive Services, Sixth Report and Order, 99 F.C.C.2d 1020 (1985).

[7] In fact, the court recognized that permissive regulatory forbearance by an agency is generally not (Footnote continued)

In the years since the adoption of forbearance, competition in the long distance market has increased greatly. Customers have a wider variety of carriers and services than ever before. Today, as pointed out in the NPRM, well over 400 nondominant interexchange carriers offer common carrier services. NPRM at ¶ 3. Thus, an entire industry has grown up regulated under the jurisdiction of the FCC in accordance with the forbearance policy. Many of the smaller carriers today would not be here now or be able to continue offering competitive services under a more burdensome regulatory structure. Given that forbearance regulation has yielded a pro-competitive environment critical to the survival of a substantial number of nondominant interexchange carriers, the Commission and federal courts should exercise judicial restraint so as not to disrupt the much needed benefits resulting from the current regulatory scheme.[8]

(Footnote 7 continued from previous page)
reviewable by the judiciary. 765 F.2d 1186, 1190 n.4. See also Heckler v. Chaney, 470 U.S. 821, 832 (1985) (finding Food & Drug Administration decision not to take investigatory and enforcement action regarding drugs used for lethal injections immune from judicial review under § 701(a)(2) of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2)).

[8] To determine the lawfulness of permissive forbearance as both a judicially sanctioned and long-standing practice, see pp. 7-8 supra, stare decisis would be especially appropriate where, as here, (1)
(Footnote continued)

II. THE COMMISSION'S ORIGINAL ANALYSIS IS SOUND

The Competitive Carrier decisions did not develop overnight in a rash stroke of deregulatory fervor. Instead, the Report and Orders reflect a series of deliberate, careful and moderate steps taken over time in furtherance of the goals of the Communications Act. As the agency charged with administering the Communications Act, the FCC is expected to act efficiently and flexibly in the context of the conditions and characteristics of the industry it regulates. That is what it did in implementing forbearance as part of its regulatory scheme.

In the Competitive Carrier proceeding, the FCC found that it could implement a forbearance policy as part of the communications regulatory structure, in compliance with Section 203(b)(2) of the Act, within its broad grant of authority, and in furtherance of its mandate under the Act to

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(Footnote 8 continued from previous page)
Congress has enacted legislation in reliance upon the presumption that permissive forbearance is lawful, and (2) carriers are relying upon permissive forbearance to protect their property and contract rights. Cf. Hilton v. South Carolina Public Railways Comm'n., 112 S. Ct. 560, 564 (1991) ("Stare decisis has added force when the legislature . . . and citizens . . . have acted in reliance on a previous decision.")

> make available . . . to all people of the United States a rapid, efficient Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges[.]

47 U.S.C. § 151. Forbearance in this case is not an end in itself, but a form of streamlined regulation to ensure that the goals of the Act are met.[9] The analysis in the Competitive Carrier decisions of the scope of the Commission's authority is still entirely valid.

A. The Communications Act on its Face Supports the Commission's Adoption of a Forbearance Policy

The United States Supreme Court has often stated that statutory interpretation should begin with "the language of the statute itself." See e.g., Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). See also National Ass'n of Broadcasters v. FCC, 740 F.2d 1190, 1201 (D.C. Cir. 1984) ("The language of the statute [is] the proper starting point for both agencies and courts as they struggle to sort out the complex and often elusive responsibilities that Congress had delegated to them"). Since the language in Sec-

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[9] To this end, the Commission could as well have adopted the "definitional approach" discussed in the Competitive Carrier proceeding which removed certain carriers from Title II regulation by classifying them as noncommon carriers. See Section IV infra.

tion 203(b) regarding the Commission's power to modify carriers' tariff filing procedures is facially plain, neither the Commission nor the courts need to go further to define the powers that Congress delegated to the Commission through this section. One must conclude that the plain language was intended to mean what it says. See AT&T v. FCC (Enlarged Notice), 503 F.2d 612, 616-17 (2d Cir. 1974).

Pursuant to the plain language contained in Section 203(b)(2), the Commission clearly has the discretionary power, provided there is good cause, to

> modify any requirement made by or under the authority of this section either in particular circumstances or by general order applicable to special circumstances or conditions . . . .

47 U.S.C. § 203(b) (emphasis added). Therefore, the Section 203(a) provision that common carriers file "schedules showing all charges" may be modified by general order of the Commission applicable to special circumstance or conditions. A carrier's nondominant status would be considered such a special circumstance or condition.

Before Section 203(b) was amended in 1976, Section 203(b)(2), as it currently reads for the most part, was part of the same subsection as the present Section 203(b)(1). That subsection read:

> No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(Emphasis added). When Congress amended Section 203(b) in 1976, it repositioned the underlined language to the separate subsection in which it presently resides. See P.L. 94-376, 90 Stat. 1080, (approved August 4, 1976).

Although the legislative history does not fully explain this repositioning, the isolation of the relevant language from Section 203(b)(1) appears to indicate that Congress wanted to clarify that the Commission's power to modify the Section 203 requirements is not restricted to its power to change the notice period that carriers must endure under Section 203(b)(1) before changing their filed rates. Thus, the separation of Section 203(b)(2) and Section 203(b)(1) supports the conclusion that Section 203(b)(2) permits the Commission to modify any requirement contained within, made by or made under Section 203. Among these requirements is the requirement that all common carriers file tariffed rates for interstate communications services.

B. Congress Granted the FCC Broad Discretion and Flexibility to Shape Regulatory Structure in Furtherance of the Goals of the Act.

There can be no question but that Congress has granted the FCC broad regulatory discretion. Regulatory forbearance by the FCC consistent with the letter and spirit of the Act is well within the Commission's discretion.

Thus, the D.C. Circuit Court of Appeals has stated the Communications Act "grants the FCC broad authority to regulate all aspects of interstate communications." ACLU v. FCC, 823 F.2d 1554, 1558 (D.C. Cir. 1987), cert. denied, 485 U.S. 959 (1988). The Court has also found the FCC was granted "not niggardly but expansive powers." NARUC v. FCC, 525 F.2d 630, 638 n.37 (D.C. Cir.) cert. denied, 425 U.S. 992 (1976) (quoting NBC v. U.S., 314 U.S. 190 (1943)), and that the FCC's broad discretion "involve[s] the power not to exercise particular authority which it has been granted." NARUC v. FCC, 533 F.2d 601, 620 n.113 (D.C. Cir. 1976) (finding that a holding that the FCC has the discretion to refuse to exercise its common carrier regulatory powers does not compel the conclusion that it also has the discretion to preempt state common carrier regulation). See also Policy and Rules Concerning Rates for Competitive Services,

Further Notice of Proposed Rulemaking, 84 F.C.C.2d. 445, 473-74 (1981) ("Further Notice").

Whether the Commission has the authority to forbear from enforcing certain regulatory requirements as to some common carriers is only a small piece of the regulatory puzzle. The more important point is that the Act authorizes the Commission to set up a comprehensive system of regulations to further certain goals; the primary goal is the development of a widely available and technologically advanced telecommunications system for all users at reasonable prices in the United States. Forbearance has been a facet, adopted by the Commission since 1982, of such a comprehensive regulatory scheme.[10]

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[10] The Commission's forbearance policy regarding the filing of tariffs is not revolutionary in regulatory terms by any means. Similar regulatory restraint has been utilized by regulatory agencies in other industries and upheld by the courts when the purposes of the governing statutes are furthered. See Federal Power Commission v. Texaco, 417 U.S. 380 (1974) (finding that the Federal Power Commission ("FPC") could regulate the rates of certain small producers indirectly based on market prices, assuming that the record reasonably supported the FPC's conclusion that just and reasonable rates would be maintained); Baptist Hospital East v. Sec. of Health and Human Services, 802 F.2d 860 (6th Cir. 1986) (finding Provider Reimbursement Board properly refused to exercise jurisdiction over Medicare claims by health care providers who had already self-disallowed the claims as bad debts, charity and courtesy allowances; court found this decision to be in harmony with the letter and spirit of the Medi-

(Footnote continued)

Forbearance is simply a form of regulation. Cf. Computer and Communications Ass'n v. FCC, 693 F.2d 198, 212 (D.C. Cir. 1982) cert. denied, 461 U.S. 938 (1983) (in reviewing FCC's Computer II decisions, the Court approved FCC's limited forbearance from Title II regulation of common carrier services because Commission's discretion "extends to deciding what regulatory tools to use"). The Commission has not declined jurisdiction over nondominant common carriers. Under forbearance, the FCC simply utilizes the tool of competitive pricing to ensure compliance with Title II's substantive criteria, including just, reasonable, and nondiscriminatory terms and rates in the first instance. Even so, however, if a nondominant carrier files a tariff, the FCC will still consider the tariff on its merits and may reject such a tariff or commence a tariff inves-

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(Footnote 10 continued from previous page)
care Act); Pan American World Airways v. CAB, 392 F.2d 483 (D.C. Cir. 1968) (permitting Civil Aeronautics Board ("CAB") to decline regulating unlicensed foreign tour operators under certain circumstances, even though a literal reading of the Federal Aviation Act would have required CAB to permit such operations only by issuing a license pursuant to an administrative hearing; the Court determined that requiring prior approval in this case would not further the purposes of the Aviation Act or CAB and presidential policy).

tigation if circumstances warrant. See, e.g., Capital Network Systems, Inc. Tariff F.C.C. No. 2, 6 F.C.C. Rcd 5609 (1991) (rejecting tariff to introduce Interstate Common Carrier Transfer Service on the grounds that tariff terms are patently unlawful).

C. The Communications Act Was Intended to Prevent Monopoly Abuses Which Are, by Definition, Not a Problem with Nondominant Competitive Carriers

The Commission's analysis of the legislative history of the Act in the Further Notice, 84 F.C.C.2d 445, 456-63, was accurate and thorough. It is clear that Title II of the Communications Act reflects Congress' goal to prevent monopoly abuses such as unreasonable refusals to deal, discrimination and price-gouging. See 47 U.S.C. §§ 201-205, 213, 218-220.

In 1934, the telecommunications industry was dominated by a few service providers -- AT&T, Western Union, ITT and RCA -- and competitive entry was not part of the picture. Much of the testimony before Congress on the legislation that became the Communications Act centered on monopoly issues. See Hearings on S.2910, 73 Cong., 2d Sess. 87, 100, 142-145 (1934); Hearings on H.3801, 73 Cong. 2d Sess. 200 (1934). By adopting a statute of great breadth, however, Congress deliberately retained for the Commission the flexibility to adjust the

regulatory scheme in the context of changing industry characteristics to further the service improvement goals of the Act.

In today's competitive environment, nondominant carriers cannot profitably engage in the abusive practices which the Act was designed to prevent. The lack of market power by these entities assures that the public will be afforded the just and reasonable rates required under Sections 201(b) and 202(a) of the Act by ensuring a competitive environment in which pricing is determined by market forces. Therefore, some of the regulatory tools used in the past to curb such abuses have been rendered anomalous and would perversely affect this competitive environment. For example, if competition exists, carriers cannot pass costs of bad investments onto ratepayers. Strict rate base regulation is thus not necessary,[11] and

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[11] The Commission has determined that such rate base regulation is in fact not desirable. In adopting price cap regulation for AT&T, the FCC specifically pointed out that rate of return regulation does not "drive [dominant] carriers to engage in the same type of efficiency-enhancing and innovative behaviors that mark the operations of competitive enterprises." Policy and Rules for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking, 4 F.C.C. Rcd 2873, 2900 (1989). The Commission also addressed the benefits of freeing Commission resources "to focus on . . . important regulatory policies, such as the enforcement of market rules that foster competition." Id. at 2912.

detariffing for nondominant carriers has presented no risks to consumers.

III. NEITHER MAISLIN NOR ANY OTHER COURT DECISION RENDERS THE COMMISSION'S COMPETITIVE CARRIER DECISIONS INVALID.

In the NPRM, the Commission asks whether Maislin Industries v. Primary Steel, 110 S. Ct. 2759 (1990) renders its prior analysis invalid. It does not. First of all, Maislin involved the Interstate Commerce Act and not the Communications Act; Maislin is relevant only by analogy. Moreover, Maislin is not on point in its facts even by analogy. Finally, other court cases interpreting the FCC's discretion under Section 203(b)(2) endorse the current forbearance policy.

A. The Communications Act and the Interstate Commerce Act Are Not Identical.

Even though the Communications Act was derived from the ICA, recent court interpretations of the ICA such as Maislin do not have stare decisis value in interpreting the Communications Act.

The Communications Act was never intended to be a "carbon copy" of the ICA. AT&T v. FCC, 503 F.2d 612, 616 (2d Cir. 1974). Indeed, the Communications Act was "a very carefully prepared bill," id. at 617 (quoting 78 Cong. Rec. 8872 (1934)), and can only be viewed as a

refinement of the ICA to meet the special concerns of communications industry regulation. See H.R. Rep. No. 1850, 73 Cong., 2d Sess. 4 (1934) ("the [ICA] never has been perfected to encompass adequate regulation of communications . . . . As a consequence, there are many inconsistencies in the terms of the [ICA] and also many important gaps which hinder effective regulation . . . . [The Communications Act bill was modified] so as to provide adequately for the regulation of communications common carriers"); General Tel. Comp. v. U.S., 449 F.2d 846, 856 (Cir. 1971) (emphasizing that the factors which the ICC must consider under the ICA warrant a more restrictive regulatory approach than that which the FCC may employ in regulating communications carriers).

Since the adaptation of Section 203 of the Communications Act from the corresponding section of the ICA, the two statutes seem to have parted company through various amendments and interpretations in terms of the discretionary power granted to their respective regulatory agencies. The Interstate Commerce Commission's ("ICC") power to modify tariffing requirements has been constricted while that of the FCC has been broadened.

At the time that the Communications Act was passed, the ICA counterpart to Section 203(b) read: